

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE  
Sub-Registry San Fernando

No. S. 264 of 1988

IN THE MATTER OF THE WILLS AND PROBATE ORDINANCE  
AND IN THE ESTATE OF BOBBY ALI HOSEIN DECEASED

Between

ROSA FARIDA HOSEIN

Plaintiff

And

KAMAL HOSEIN  
(executor of the Will of  
Bobby Ali Hosein, deceased)

Defendant

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**JUDGMENT**

**Before the Honourable Mr. Justice V. Kokaram**

**Appearances:**

Mr. Devindra Rampersad for the Plaintiff

Mr. Edwin Roopnarine and Ms. C. Sinanan for the Defendant

**1. BACKGROUND FACTS:**

9.1 Procedurally the matter before the Court has endured a long and convoluted journey. So long was this journey that during its course several attorneys and judicial officers who had conduct of or dealt with this matter have long since retired while these litigants,

family members, continue to battle. Unfortunately the battle may continue in other aspects of this action even after this judgment.

9.2 In summary the Plaintiff, Rosa Farida Hosein, who is the sister of the Defendant, Kamal Hosein, commenced an action against her brother, the sole executor of the will of Bobby Ali Hosein. Both parties are the children of the said Bobby Ali Hosein and Nageeran Hosein (both deceased). It is the Plaintiff's contention in that action, that her brother has failed to properly administer their father's estate, failed to convey her portion of land bequeathed to her under their father's will and is abusing his authority as executor.

9.3 This substantive application in HCA s 264 of 1988 was instituted by the Plaintiff, by way of Originating Summons dated and filed 19<sup>th</sup> February 1988 ("the main action"). By this Summons the Plaintiff seeks the following relief, viz:

*(a) An Order for the Administration of the estate of Bobby Ali Hosein, with all necessary and proper accounts, directions and inquiries.*

*(b) An order directing the Defendant to vest in the Plaintiff her share of the estate of the said deceased.*

*(b) An order directing the Defendant to pay to the Plaintiff such monies as may be found due to her upon the sale of the property situate at Penal Junction, Penal Junction, Penal in the Ward of Siparia in the Island of Trinidad and more particularly described in Crown Grant in Volume 78 and other relief.*

*That the Defendant personally pay the costs of this application."*

9.4 This Summons is still to be heard before a different Judge later this year.

1.5 The Will of Bobby Ali Hosein:

Bobby Ali Hosein (the deceased) departed this life on 23<sup>rd</sup> September 1970 and was at his death the registered proprietor of All and Singular that piece or parcel of land situate

at Penal in the Ward of Siparia, Trinidad comprising 9 Acres 3 Roods and 11 Perches and more particularly described in Crown Grant in Volume 78 Folio 591.<sup>1</sup> Prior to his death he executed a will dated 28<sup>th</sup> June 1969 which from part of an agreed bundle of documents.

- 9.1 By his last will and testament dated 28<sup>th</sup> June 1969, (see Appendix I) the said Bobby Ali Hosein devised and bequeathed certain lots from this parcel of land to his children, including the Defendant and the Plaintiff, his grandchildren and his wife. After so devising these various lots there was a remaining portion of land which the deceased devised as follows:

*“As to the remaining portion of the said land, it is to be divided equally as follows:*

*North East- Afzal and Kamal Hosein*

*North West- Farida Hosein*

*South East- Kamal Hosein*

*South West- Afzal Hosein*

*The oil sand road running from South to North through this portion of land must always be maintained and kept open.*

*The road 33 feet wide in the said parcel of land is to be maintained and kept open by all occupants.*

*“My property at Penal Junction comprising of a wooded building and the house spot I give Devise and Bequeath unto my wife the said Nageeran Hosein and my son the said Kamal Hosein in joint tenancy”.*

- 9.2 The Defendant as executor has not yet conveyed the North West portion of the said land to the Plaintiff. To date no survey has been completed to properly identify the property to which she is entitled to under this will in the North West portion for the reasons explained below.

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<sup>1</sup> Paragraph 3 of the Plaintiff’s Statement of Facts and paragraph 1 of the Defendant’ Defence. See Appendix 1.

9.3 The previous orders of the Court:

By order dated 20<sup>th</sup> July 2004 Stollmeyer J ordered inter alia:

*“that by consent Mr. Harvey Ramrekha to carry out a survey of the remaining portion of land comprising 2.1073 Hectares of the parcel of land originally described in Crown Grant Registered in Vol. 78 Folio 591 and to show on that plan*

- (i) The location of Well 148*
- (j) The location and extent of the area originally occupied by Bobby Ali Hosein deceased and which is referred to as the “house spot.”*
- (k) The extent and area of any changes in those boundaries as at 30/7/04.*
- (l) The remaining portion divided into 4 quarters as provided for in Will of Bobby Ali Hosein deceased.*
- (m) The Defendant to commission such plan on or before 9/8/04. In default Plaintiff is at liberty to commission such Survey and recover the full costs of same from the Defendant.*

1.9. By order dated 30<sup>th</sup> July 2004 Smith J ordered by consent that:

- 9. The Plaintiff do commission Mr. Harvey Ramrekha to carry out survey of the remaining portion of land comprising 2.1073 hectares of the parcel of land originally described in Crown Grant in Volume 78 Folio 591 and to show on that plan the matters mentioned in paragraphs 1.1 to 1.4 of the order of Mr Justice Humphrey Stollmeyer dated the 30<sup>th</sup> July 2004.*
- 10. The portion of land is to be divided up and partitioned by Mr. Harvey Ramrekha into 4 portions according to the Will of Bobby Ali Hosein.*

11. *In the event of the said Harvey Ramrekha being unable to ascertain the extent of the “house spot”, that:*
  - 11.1 *There be a trial of the issue of the extent of the “house spot” referred to in the Will of Bobby Ali Hosein dated the 28<sup>th</sup> June, 1969 in respect of which: the matter is hereby placed before the next available Cause List.*
  - 11.2 *Upon the completion of the trial of the said issue of the extent of the “house spot”, the said Harvey Ramrekha to complete the plans as per the order of the Honourable Mr. Justice Humphrey Stollmeyer of the 30<sup>th</sup> July, 2004.*
4. *The Defendant to assent to the Plaintiff her portion of the lands mentioned at paragraphs 1 and 2 above within 14 days of the presentation of properly approved plans.*
9. *In default, the Director of Surveys approving the said plans the said lands are to be assented to the parties mentioned in the Will of Bobby Ali Hosein as tenants in common within 42 days of the refusal.*
10. *The Defendant to pay the costs of such survey by Mr. Ramrekha.*
11. *In default of the Defendant completing any assent as mentioned in paragraphs 3 and 4 herein, the Assistant Registrar to execute the necessary Memorandum of Assent to be prepared by the Plaintiff and the cost of the same to be paid by the Defendant.*
12. *The originating summons dated the 19<sup>th</sup> February 1988 as amended by Justice Stollmeyer on the 30<sup>th</sup> July 2004 is adjourned to the 24<sup>th</sup> November, 2004.”*

1.10 Unfortunately to date the estate has not been fully administered and despite the entreaties by this Court to have this matter resolved, the parties, no doubt as they are entitled to do, has sought the intervention of this Court in the resolution of only one issue

in this administration of the estate: that of identifying a parcel of land or property described in the will of Bobby Ali Hosein as the “house spot”.

## **2. THE MATTER BEFORE THE COURT**

2.1 The matter before this Court is referable to the consent order of Smith J as aforesaid.

The material parts of that order states:

*“In the event of the said Harvey Ramrekha being unable to ascertain the extent of the “house spot”, that: There be a trial of the issue of the extent of the “house spot” referred to in the Will of Bobby Ali Hosein dated the 28<sup>th</sup> June, 1969 in respect of which: the matter is hereby placed before the next available Cause List.”*

9.1 This is the matter before this Court. The parties have been unable to resolve this issue amongst themselves and seeks the Court’s guidance on the boundaries of the “house spot”.

9.2 Both parties filed their respective pleadings on this issue. The rivaling propositions on the dimensions of the boundaries of the house spot by the Plaintiff and the Defendant were reduced into draft plans and are annexed hereto as Appendix 2 and 3 respectively. In Appendix 1 the Plaintiff’s version of the “house spot” is identified in the hatched portion within D 1. In Appendix 3 Defendant’s version is shown on the plan as #27. The parties also tendered an agreed bundle of documents including the will, survey plans and several photographs.

9.3 Oral evidence for the Plaintiff was tendered by the Plaintiff herself, her husband Abidh Hosein and the surveyor Harvey Ramrekah. The Plaintiff lived in the deceased’s

dwelling house in the North Western portion from her childhood days.<sup>2</sup> Abidh Hosein met the Plaintiff at the said deceased's home in 1962 some years prior to the death of her father. He married the Plaintiff in 1963 and commenced living in the deceased's dwelling house when he eventually moved with the Plaintiff into a dwelling house of their own to the immediate North of the deceased's home around 1965.

9.4 In summary both testified as to the dimensions of the dwelling house and the immediate environs. They both gave a picture of the deceased's parcel of land as one leaves the Siparia Erin Road and proceeded North along the Bobby Hosein Avenue.<sup>3</sup> They both referred to the photographs to demonstrate the nature of the property at the time of the life of the deceased and at present.

9.5 Among other matters of user of the property, Mr Hosein testified that he "used to cutlass" the area around the deceased's house including down in the gully to the West of the House. He observed men cleaning the roof of the deceased's home by using a ladder from the Southern side to climb unto the roof. The oil sand road was the widest to the South and it can safely be presumed that this was the yard of the deceased's home. In the various photographs taken during the life of the deceased it was used as a parking area. Mr. Roopnarine in his cross examination took Mr. Hosein around the boundaries in an attempt to identify distances and landmarks. The Court relies upon the distances given by both witnesses as guides and estimates in defining the boundaries of the house spot.

9.6 The Plaintiff was very cautious in giving her evidence and argumentative. The Court did not place heavy reliance on her testimony.

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<sup>2</sup> See photograph RFH 1

<sup>3</sup> See plans at Appendix 1 and 2

9.7 The surveyor displayed the calm disposition of the expert appointed to conduct the survey. His evidence was quite helpful to a resolution of these issues. The Eastern, Northern and Western boundaries demarcated on his map are all eminently reasonable and consistent with this Court's findings as to the meaning of the words "house spot" as set out below.<sup>4</sup> He was quite frank as to his findings on the Southern boundary and his identification of landmarks to the South of an old curb wall, poui tree and light pole were helpful.

9.8 The Defendant elected not to lead any evidence.

### **3. THE ISSUES:**

3.1 The issues to be resolved in this matter are as follows:

- (i) What is the relevant date for establishing the dimensions of the house spot?
- (j) What was the intention of the testator in the use of the words "house spot"?
- (k) Which of the parties' description is consistent with the words used in the will.
- (l) Whether the Court can identify the boundaries of the land which is to be devised pursuant to the will of Bobby Ali Hosein as the "house spot".

9.1 The issue before the Court is therefore essentially fact driven and the boundaries of the "house spot" are to be obtained using the normal rules of construction of wills and from a proper analysis of the evidence led by the parties as to the intention of the testator, the use and occupation of the deceased of the house and its immediate environs.

### **4. THE RELEVANT DATE:**

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<sup>4</sup> The Court was however troubled by the fact that Attorney for the Defendant attacked the credibility of this witness and questioned his motives in a scenario where he was by the consent of the parties appointed by the Court to conduct a survey for the benefit of this Court and the parties. This does not auger well for the disposition of other aspects of the main action

- 9.1 Unless a contrary intention appears in the will, it must be construed with reference to the real estate comprised in it to speak and take effect as if it had been enacted immediately before the testator's death. See *Halsbury Laws of England Volume 50 4th ed reissue paragraph 573; Re Portal and Lamb (1885) 30 Ch. 50 and section 54 Wills and Probate Ordinance Chapter 8 no 2.*
- 9.2 There is no contrary intention on the face of the will and none has been argued to exist by either party. The will must be construed to speak in reference to the state of affairs of the deceased in June 1969.
- 9.3 The rivaling contentions of the parties of the exact boundaries of this portion of land comprising the "house spot" are to be found on the survey plans of both parties.<sup>5</sup>

**5. INTERPRETING THE WILL OF BOBBY ALI HOSEIN:**

- 9.1 This case requires the Court to interpret the provision of the will to determine what was actually bequeathed unto the Defendant when the deceased used the following words:  
*My property at Penal Junction comprising of a wooded building and the house spot I give Devise and Bequeath unto my wife the said Nageeran Hosein and my son the said Kamal Hosein in joint tenancy*".
- 9.2 It is clear that the deceased intended to give unto his wife and the Defendant in joint tenancy his property at Penal Junction comprising of a wooden building and the house spot. The wooden building is clearly visible in the pictures annexed to the Plaintiff's Reply dated and filed 6<sup>th</sup> February 2006 and accepted by the Defendant.<sup>6</sup> The wooden building appears to be a classical chattel house of modest means and it is accepted by the parties that the dimension of the house was approximately 30 x 45 feet. There was a front porch facing the Eastern boundary and the house is elevated off the ground by

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<sup>5</sup> The survey plan exhibited by the Plaintiff is annexed hereto as Annexure 2 and that of the defendant as annexure 3

<sup>6</sup> See exhibits FH1, FH2, FH3 and FH4

several wooden posts. There is an oil sand road which leads up to the house and surrounds the house on its Southern, Eastern and Northern boundaries.

- 9.3 It is instructive to note that the surveyor appointed to conduct a survey of the portion of land, Mr. Ramrekha, could not identify the “house spot.” He stated *“the term house spot is not a definitive term... Usually we are guided by an occupation of a house if it is fenced or closed or look at the structure together with outhouses and sheds so that they may constitute a unit..”* Such a term as “house spot” is a term of art and does not exist in his field of expertise. Indeed as was common with similar dwelling houses during the life of the testator, there was no wall nor fence demarcating any defined area or space which one can attribute to a “spot”. The definition of “house spot” must be derived utilizing the canons of classical interpretation.
- 9.4 The Court must extract and give effect to the intention of the testator as expressed in the words of the will. This is the paramount rule. Generally the following principles are useful in guiding a Court in ascertaining the intention of the testator:
- (a) The intention is collected from a reading of the entire will. Words will be read in the context of the entire will.
  - (b) The meaning of the will and every part is determined according to that intention.
  - (c) A benevolent construction is adopted so that form and language of the will are unimportant if the intention is clear.
  - (d) If any term is used by a testator which has a primary or ordinary legal meaning that is the sense in which it ought to be construed unless the Court is satisfied by evidence collected from the will itself of the testator’s intention to use it not in that sense but in some different sense.
  - (e) The Court is bound to place itself as far as possible in the situation of the testator when the will was made and to expound the bequests which are contained in it by the light afforded by the surrounding circumstances.

See *Williams on Wills Volume 1* (2002) paragraph 50.1. *Slingsky v Rianger* (1859) 7 H.L. Cas 273. HCA 1391 of 1994 *Patricia Joseph v Francis Joseph*. See also *Doe v Collins* (1788) 2 T.R. 503 per Buller J:

*“In construing wills we do not look at technical words so much as the testator’s intention which can only be collected from the whole will. There, in determining what passed under the bequest, it is material to consider the situation of the devisor.”*

5.5 The Court must therefore ascertain the intention of the testator from the words used within the context of the provisions of the will considering the realities and circumstances of the testator. A careful perusal of this will demonstrate an emphasis on the testator’s children being the object of the testator’s devise. Indeed three (3) children Afzal, the Defendant and the Plaintiff are adequately and indeed equitably provided for in this will. In clauses A, B and C of the will the parcel of land owned by the testator is divided almost equally amongst these children giving at least six (6) lots each. It is noted that the Plaintiff received 7 lots. In clause D of the will the testator’s wife receives only 4 lots and after her death Afzal and the Defendant received an additional lot each and their sister the Plaintiff received an additional two (2). Indeed from the testimony of the witnesses in this case the Plaintiff lived with the testator at his home and eventually, after her marriage, a few feet away in a home which the testator helped to construct for her daughter. The wooded house and house spot referred to in the will was not given to the wife alone but to the wife and the Defendant as joint tenants. In the end the testator intended to give the Defendant 7 lots together with this house spot situate on his daughters portion of the demise. The remainder of the will divides various property of the testator equally amongst the testator’s children. On the face of the will the testator, intending to divide his property equally amongst his children, leaned slightly on the side of providing more favourably for the Plaintiff, indeed his only daughter.

6. **THE RIVALING CONTENTIONS:**

- 9.1 The Plaintiff is alleging that the house spot referred to in the said will *comprised less than one lot measuring 50 feet in width by 100ft in depth* as set out in Paragraph 7 of the Statement of Claim. She contends that the “house spot” *“does not include curtilage, surrounding lands where the garden outhouse water tanks and copper were located. The deceased was careful to limit the amount to be excised there from merely to the house spot occupied by the wooden chattel house standing thereon.”*<sup>7</sup> For the reasons set out hereinbelow the Court does not accept such a limitation or restriction to the term “house spot” within the context of the nature of the devise and the facts of this case.
- 9.2 The Defendant however contends that at the time of the testator’s death the testator intended to *“make a gift of that area he considered to be his family home and/or family compound including the chattel house and the surrounding lands to his wife and the Defendant”*. For the reasons set out below this is a more accurate representation of the term “house spot”, however the Court’s function is to properly identify the boundaries of this family home. The Court does not agree with the submissions of the Defendant with regard to the Southern boundary for the reasons set out below.
- 9.3 Essentially both parties submitted that the Court must glean the intention of the testator from his actions. The Defendant focused on his relationship with his wife “the object of his bounty”. The Plaintiff took a more formalistic line from the approach of the words of the will to glean intention. Essentially they both agreed that the devise included all such lands that are necessary and essential for the use and benefit of the dwelling house as a home for the wife and son. The Plaintiff took the burden of demonstrating a restrictive approach to the definition of house spot.

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<sup>7</sup> See paragraph 13.1 of the Plaintiff’s reply

9.4 The Court noted with some regret that both parties resorted to accusations of one party “imprisoning” the other and creating a landlocked situation by their opposing definitions of the boundaries of this spot. It is the Court’s view that clearly the deceased never foresaw in the first place that there will be any controversy between his siblings over their entitlement to portions of his estate. Indeed if the position of the parties in this action were more reasonable an amicable and livable resolution to this matter could have been arrived at.

9.5 At the stage of the closing submissions it became evident that the real dispute between the parties is the Southern boundary of the house spot. The Plaintiff contends that it does not include any area that was not in use at the date of the death of the deceased. This excludes the out house and water tank at the West and the light pole at the South. The Defendant contends however that the testator had these items in mind on making this will and he intended his wife to have the benefit of this at the time of his death.

## 7. **THE HOUSE SPOT OF MR. BOBBY HOSEIN:**

9.1 The term “house spot” appears to be a term of art that is unique to the Caribbean. It has been referred to in several cases in the Commonwealth Caribbean however without any clear definition as to the meaning of the term. See *Porte v Smith* (1958-1960) 2 Barb LR 156, *Boyce v Phillips* (unrep) CA Bados Magistrateral Appeal No 11/1998 (2000); *Rose Bharath v Carl Thomas* (2003) HCA 2109 of 2003 (Trinidad and Tobago). The meaning of this term must therefore be gleaned from the intention of the testator in the context of the devise. As such the extent and nature of a house spot will vary from case to case.

9.2 The testator did not use the words “house spot” in isolation. He referred to “wooden building and house spot”. The Court agrees with Attorney for the Plaintiff that the testator, when one examines the contents of the entire will, was very careful and meticulous in his devise and in the identification of his property. He was familiar with and

described property by reference to deeds, crown grants, lots, acreages and surveys in cadastral sheets. He was careful to state that the “road 33 feet wide” be maintained. This was actually in reference to the road reserve observed on a previous cadastral sheet which comprise the Bobby Hosein Avenue and not the actual avenue in use. The will was prepared together with or by a solicitor.<sup>8</sup> The words used therefore by this testator are not without its significance. Hence this Court must give effect to the care the testator exercised to distinguish between the physical chattel house and a house spot, both words together comprising “my property at Penal Junction”.

- 9.3 It is clear therefore that “house spot” in this case is not synonymous with the physical house or wooden building. Therefore in Halsbury Laws of England 4<sup>th</sup> ed reissue at paragraph 475

*“Words which prima facie describe only a house or other building may in suitable contexts and circumstances include land necessary and convenient for the use and occupation of it. A gift of a house and premises is prima facie sufficient to include such land and the appurtenances of the house. Even other land commonly enjoyed with the house may be included in such a description.”*

- 7.4 Examining the authorities referred to this Court, a “house spot” used in the context of the words in this will is akin to the reference to “house and premises” or “house and garden”. *Williams on Wills* 8<sup>th</sup> ed Vol 1 para 64.26 states:

*“Though the words used in the will describe merely the house or building, they may according to the context or the circumstances, include land occupied and enjoyed with it, especially if such land is necessary for its convenient use and enjoyment. A house according to its nature and the standing of those intended to*

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<sup>8</sup> It is unfortunate that the Plaintiff did not think that the testimony of the solicitor was useful. Indeed he is the only living person who may have been able to shed some light on the intention of the testator upon whose instructions he was acting

*occupy it must include a garden, pleasure grounds, proper approaches and out buildings such as a garage or stables and coach house. The word "house" is often accompanied by further words such as "and premises" or "and appurtenances" and then something further than the actual building must be included and this may extend to land commonly enjoyed with the house."*

9.4 In essence therefore "house spot" refers to more than just the dwelling house but such lands that are commonly enjoyed with the house. In **Doe v Clements** a bequeath in the following words "*I give the house I live in and garden to B*" included the stables and coal pen occupied by the testator together with the house, as the testator used them for purposes of trade as well as for the convenience of his house.

9.5 "House spot" in this context is used to convey a dwelling area, a spot that is used by the occupant for the enjoyment of his household. It is not intended to extend to such land, appurtenances, chattels that are not connected to the use and enjoyment and convenience of the house as a dwelling. Therefore, by way of example only, it would not include such areas as open fields, of gardens if it was not sufficiently connected to the enjoyment of the house as a dwelling. It may include fruit bearing and flowering trees and plants if it is demonstrated on the evidence that its presence is for the enhancement, convenience and enjoyment of the property and its occupants.

9.6 The Court accepts the submissions of Ms Sinanan of the distinction between those cases where the term "house" was interpreted in the context of a will as distinct from its use in the context of a statute. However there are useful tests to be applied to determine what property is to be included in the description of "house spot" as used in this devise: proximity, usage and necessity. See *Low v Staines Reservoirs Joint Committee* 16 TLR 184. (1863) LT *Fergusson v London Brighton and South Coast Railway Company*; *Pulling v the London Chatham and Dover Railway Company*(1854) LT 741; *Kerferd v Seacombe* (1888) 57 LT 445. The Court must ask therefore whether the lands being contended by either side as included in the devise is sufficiently

proximate to the use of the house, actually used with the enjoyment of the house and was of necessity to the use and enjoyment of the house as a dwelling place.

9.7 Attorney for the Defendant focused his cross-examination on the identification of landmarks as boundaries of the house spot. Indeed this proved very useful but must be consistent with the intention of the testator in the use of the word “house spot” within the context of this will and the facts adduced in this case.

## 8. LANDMARKS

9.1 There are useful landmarks on the ground in the vicinity of the deceased’s house, which serves as useful guides in determining the extent of and boundaries of the “house spot.”

9.2 The oil sand road:

This road borders the North, East and Southern portions of the dwelling house. There was no contest by the Defendant that indeed the oil sand road to the East of the dwelling house represented the Eastern boundary and so it is with the North. It is noted that the Plaintiff’s dwelling home to the North is also a useful landmark having been erected there before the demise of the testator. It is reasonable that a point that is equidistant between the two buildings on the oil sand road represents the Northern and Southern boundary respectively of both buildings.

9.3 The oil sand road to the South of the house is considerably wider. The Plaintiff and her husband estimate that at the time of the death of the testator it would have been some 15 to 20 feet in width. It is noted that this is the only yard of the dwelling house and some latitude should be given for the boundaries of the house spot in this direction.

9 . 4 The light pole:

It is also noteworthy in this case that the deceased was the owner of the larger 9 acre piece of land on which he together with his wife and children occupied a “house spot”

on the highest point on the property and other members of his family and/or servants occupying other parcels of land in that estate. A lane named after the testator, the Bobby Hosein Avenue, divides the estate. It is no surprise that the testator and owner of the entire estate placed his house and “house spot” at the end of that road. This is not an uncommon occurrence in Trinidad.

9.5 It also is no surprise that the testator would erect a private light pole powered privately from his own generator on his property. However this Court is not convinced, based on the evidence in this case, that this light was used for the sole or dominant purpose to see his “spot” or land in the night for security reasons and to see his visitors. There is no positive evidence to that effect. The light was not working at the time of the devise. Even if it was, it was positioned next to a curb wall. There has been no satisfactory explanation from any of the witnesses as to the use and purposes of this curb wall. The Court takes cognizance of the fact that the testator owned the entire parcel of land and an equally plausible explanation is that the light was central to the Bobby Hosein Avenue casting a light both North and South along that avenue not necessarily for the sole benefit of the users of the deceased’s dwelling house but for use of the avenue, the deceased’s avenue. Indeed if it is the case that the Southern boundary includes the light pole there is a considerable strip of land between the house and the light pole which may be pleasure grounds but there is no evidence of any association of these grounds as of necessity to and enjoyment of the dwelling house.

9.6 The Defendant himself did not help his cause by erecting a fence in 1990 to the South of his dwelling house but which did not go as far South as the light pole nor close to an old fence which Attorney for the Defendant submitted existed near to the curb wall. Indeed there simply was no such evidence tendered to this Court to support the contention that any fence existed at the curb wall.

9.7 The mango tree:

The Court is however satisfied that the mango tree which both the Plaintiff and her husband indicated was positioned to the South of the dwelling house is included within the devise of “the house spot”. Both parties placed this tree some 10 feet to the South of the oil sand road to the base of the mango tree. The sweeping of the leaves of the tree formed part of the regular chores of the Plaintiff in her childhood days; it provided fruits for the occupants of the house. Indeed such a tree is a significant landmark and is sufficiently proximate to the dwelling house.

8.8 The Poui tree:

However, the same cannot be said of the poui tree shown on the Plaintiff’s plan. As attractive the argument by Attorney at Law for the Defendant was, that the poui tree is akin to a piece of decorative art hanging on the wall of the home, there will be in principle nothing to prevent the Defendant from claiming that all he surveys becomes his kingdom, without more. There is no evidence that the poui tree was an asset, a necessary part of the enjoyment of the house as a dwelling. Having said that, there was a poui tree in the gully. It certainly cannot be said that the Western boundary would extend into the gully, an area that was clearly not used as part of the dwelling house.

8.9 The outhouse:

The external conveniences of the dwelling home of the testator included the copper cistern, the water tank and outhouse. Although the latter was not in use at the time of the demise of the testator the Court is satisfied that this is a common convenience usually included in the use and enjoyment of the dwelling house. Indeed the surveyor admitted as much that such external buildings are usually included with the house “as a unit”.

9.1 There is no positive evidence of the location and use of a birdcage and fishpond which was alleged by the Defendant’s Attorney-at-Law to have existed to the South of the dwelling house. There was reference by the witnesses to a pond but it appears that this was in

reference to a pond to the East of the Bobby Hosein Avenue which the Defendants Attorney-at-Law displayed no interest in.

**9. FINDINGS AND DIMENSIONS OF THE HOUSE SPOT:**

9.1 Upon the trial of the issue of the extent of the “house spot” referred to in the Will of Bobby Ali Hosein dated the 28<sup>th</sup> June, 1969; the Court therefore finds that the house spot was at the time of the deceased’s death that area of land on which the testator’s dwelling house is situate including such land which was incidental to the use, enjoyment and necessity of the house as a dwelling.

9.2 This house spot therefore is not restricted to the lands actually occupied by the wooden dwelling house but includes the lands adjacent to it and bounded by the following boundaries:

(a)Northern Boundary:

The house spot is bounded to the North by an oil sand road. It commenced from the East by the oil sand road known as Bobby Hosein Avenue and traverses from the East on the Northern boundary to the ridge or gully to the West of the House with a minimum of about 80 feet in width. It includes in depth about 5 to 6 feet of land from the deceased house to the Northern boundary. This boundary should be the equidistant point between the Plaintiff’s and the Defendant’s dwelling house.

(b) Western Boundary:

The house spot is bounded to the West by the gully or ridge. It includes the lands upon which is situate the water tank, outhouse and copper cistern and traverses South until the point where the mango tree existed giving a reasonable clearance for its use and enjoyment<sup>9</sup> The Western boundary should give sufficient clearance to use the water tank.

(c)Southern Boundary:

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<sup>9</sup> A 5 foot clearance appears from the evidence of the surveyor reasonable for the use and enjoyment of a certain area

The house spot is bounded on the South by an imaginary line from this point referred to in (b) above (a little south of the spot where the mango tree was situated) Eastwards to the Bobby Hosein Avenue.

(d)Eastern Boundary:

The house spot is bounded on the East by the oil sand road known as the Bobby Hosein Avenue.

- 9.3 The Court prefers to express the dimensions of the house spot in this manner. If necessary it would clarify these dimensions by reference to approximate measurements. However it will be best if the surveyor does his best to survey this spot using these boundaries. (See Appendix 4)

**10. CONCLUSIONS AND ORDER:**

10.1 The Court therefore orders

- (i) That pursuant to the order of Stollmeyer J and Smith J the surveyor Harvey Ramrekha do proceed to forthwith conduct a survey identifying the portion of land described as the “house spot” in paragraph 9 above.
- (j) Neither party has succeeded on its proposal as to the dimensions of the house spot and the Court will invite submissions on the issue of costs.

- 9.1 This Court still expresses the hope that the parties in this action will be able to amicably resolve the outstanding issues in the main action.

Dated this 8<sup>th</sup> day of March, 2006.

Vasheist Kokaram  
Judge.

Postscript:

Attorneys-at-Law requested the Court to provide a measurement for the southern boundary which the Court expressed as standing a little south of where mango tree existed to give reasonable clearance. The court invited the parties to agree to a spot south of the tree to give reasonable clearance for use of the tree. The parties not having arrived at any agreement, the court on reflecting on the notes of evidence as to the size of the tree given by the witnesses fixes the spot at 10 feet south from where the trunk of the mango tree existed.